IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

YUK WING NG,	)	DIVISION ONE
Appellant,	)	No. 62531-4-I
v.	)	UNPUBLISHED OPINION
M&G CONSTRUCTION, LLC, a Washington limited liability company,	)	
Respondent.	)	FILED: July 27, 2009

Dwyer, A.C.J. — Yuk Wing Ng appeals the summary judgment dismissal of his claims arising out of an aborted residential construction project. Ng sued M&G Construction, LLC, based on his belief that M&G breached its contract with him to build an addition onto an existing home in south Seattle. Ng contends that M&G agreed to build the addition, according to certain plans, for $145,000. We conclude that this contention is supported neither by the construction contract itself nor by any other portion of the appellate record. Further holding that Ng has failed to demonstrate any genuine issue of fact as to whether he suffered damages as a result of M&G's purported breach, we affirm.

At the outset, it is important to clarify the scope of this appeal. Ng has drafted his appellate pleadings based on the erroneous assumption that two

claims that he originally asserted against M&G—a claim for defamation and a claim for "misrepresentation/fraud"—are still extant. But those claims were not addressed by the trial court's summary judgment ruling, because Ng abandoned them. It is true that Ng's initial, hand-written complaint included the statements "Contractor defamed me in the presence of my banker" and "Contractor performed fraudulent representation," although the complaint characterized these statements as bases for jurisdiction, rather than as claims. However, even if these statements could be construed as claims, Ng amended his complaint in the midst of the litigation, and his amended complaint did not so much as mention defamation or fraud, much less assert them as theories of liability. The only claims asserted in the amended complaint were based on contractual theories of liability.

Because these claims were the only ones addressed on summary judgment, and so are the only ones addressed in this appeal, a brief description of the events that gave rise to them is warranted. After learning of M&G's existence from advertising, Ng approached the company about his remodeling project. Following discussions with one of the company's then-owners, Mike Hsu, Ng hired an architect, who prepared rough schematic drawings of the proposed project's basement and two floors. The basement drawing contained a rendering of a garage and, adjoining the garage, an area through which a large "X" was drawn, and which was clearly labeled "Crawl Space." Based on these drawings and discussions between Hsu and Ng, M&G entered a bid to construct

the project for $155,000.

Some weeks passed, after which Ng contacted M&G and informed Hsu that the rough drawings had been converted into full building plans. Hsu asked Ng if any changes had been made between the rough schematics and the building plans, to which Ng responded that the only difference was that the project had been reduced in size by 126 square feet as a result of conversations between Ng and the City of Seattle. Based solely on this reduction, Hsu agreed that M&G would be able to build the project for $10,000 less than originally anticipated, or $145,000, plus taxes.

Soon thereafter, Hsu and Ng drafted and signed a construction contract, in which the terms of the agreement between M&G and Ng were put on paper. The contract included an appendix, signed by both Hsu and Ng, which itemized every aspect of the construction project, set forth the terms of payment, and, for each floor of the project, contained a column of boxes which could be checked to indicate those rooms included in the project. Under the section entitled "Basement Level," only one box was checked—the box next to the word "Garage." No other box was checked.

After the contract was signed, Hsu forwarded the full plans (which he had apparently not examined closely) to M&G's subcontractors to obtain bids. The subcontractors quickly informed Hsu that his understanding of the plans was inaccurate. Rather than containing only a garage abutted by an unfinished crawl space, the plans contained a fully finished "Rec. Room" in the position where the

architectural drawings had contained the crawl space. Hsu estimated that the addition of an entirely new room would have resulted in the project costing M&G between $35,000 and $50,000 more than anticipated to complete.

Several months passed, in which Ng insistently wrote and telephoned M&G, inquiring as to when construction would begin. Finally, at a meeting with a loan officer at Ng's bank, Hsu communicated to Ng that the $145,000 contract price had been based on construction of a project in which a garage was the only finished room in the basement, and did not include a finished "Rec. Room," as was present in the detailed plans. Ng, in contrast, insisted that the contract included the finished "Rec. Room," leading to an impasse.

After a series of increasingly acrimonious communications, Ng filed this lawsuit, seeking "compensatory damages" of $12,000, "punitive damages" of $20,000, and "consequential damages" of $30,000. Ng's initial hand-written complaint did not specify the alleged bases for these damage amounts. Later, Ng filed an amended complaint that, as discussed above, narrowed the theories under which he claimed that M&G was liable, but also omitted any allegation of damages, instead stating that Ng "respectfully requests the above-expressed claims and allegations be honored, damages be accepted, and that the Court award Plaintiff all to which he may be entitled, including reasonable attorney fees, expenses and costs of suit." Ng did not identify any basis for the claimed right to an attorney fee award.

M&G then filed a motion for summary judgment against all of Ng's claims,

which the trial court granted. At this point, Ng caused notices of appeal to be filed both in this court and our Supreme Court. The Supreme Court characterized Ng's filing as a petition for discretionary review, denied review, and transferred the case to us. The original appeal in this court was mandated separately. Thus, this case comes before us as an appeal of the trial court's summary judgment dismissal of the claims set forth in Ng's amended complaint, following denial of direct review by the Supreme Court.

"In reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court and considers the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. . . . Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Miller v. Jacoby, 145 Wn.2d 65, 71-72, 33 P.3d 68 (2001) (citations omitted). In order to defeat a motion for summary judgment, the "nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists." Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (citing Young v. Key Pharm., Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989)).

Here, the affidavits accompanying M&G's motion for summary judgment set forth facts establishing that M&G agreed to undertake the construction of Ng's remodeling project according to the preliminary architectural drawings, *not* the detailed plans in which the finished "Rec. Room" was substituted for the

unfinished crawl space. The appellate record does not contain a single sworn affidavit or other document with evidentiary significance refuting this characterization of the events leading to this lawsuit. Moreover, the face of the contract itself unambiguously supports this conclusion, insofar as the section that enumerates the rooms to be present in the basement contains no mention of any room other than a garage.

Accordingly, we conclude from the evidence present in the appellate record, including the contract itself, that no genuine factual question exists as to whether the contract price of $145,000 (plus taxes) was based on a bid to construct an addition with a "Rec. Room." It was not. Those plans containing a "Rec. Room" were never envisioned by the contract entered into between Ng and M&G, and M&G never committed to construct a building according to such plans, for $145,000 or any other price. Not a single item in the record beyond the bare allegations in Ng's complaint calls this conclusion into question, and bare allegations are not, by themselves, sufficient to overcome a motion for summary judgment. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Thus, we hold that M&G did not breach its contract by refusing to construct an addition that contained a "Rec. Room" for $145,000, because no such contract existed.

Moreover, even *had* the parties agreed that M&G would construct an addition containing a fully finished "Rec. Room" in its basement, Ng has not demonstrated that he actually suffered damages as a result of this putative

contract's breach. As M&G correctly points out, it is an unremarkable principle of contract law, and has long been the law in Washington, that "[w]here a contractor refuses to perform his contract, damages may be recovered for the difference between the contractor's bid and the actual cost to the owner of having the work performed by others." Westland Constr. Co. v. Chris Berg, Inc., 35 Wn.2d 824, 835, 215 P.2d 683 (1950) (citing Cahalan Inv. Co. v. Yakima Cent. Heating Co., 113 Wash. 70, 193 P. 210 (1920)); see also Odgers v. Held, 58 Wn.2d 247, 248, 362 P.2d 261 (1961) (measure of contract damages aims "to place the parties in the position, at least moneywise, they would have been in had the contract been fulfilled"). Not a single evidentiary submission in the record on appeal indicates that Ng has actually sought to build his project notwithstanding M&G's purported breach, either with or without the inclusion of the "Rec. Room" on the basement level.

In sum, the record on appeal contains nothing that supports Ng's contract-based claims against M&G, the only claims that Ng did not abandon in the trial court. The contract itself facially contradicts Ng's position, and the record contains no evidence supporting his claim that he has been damaged by M&G's conduct. The trial court properly granted summary judgment in M&G's favor.[1]

Affirmed.

[1] Both parties request appellate attorney fees—Ng without any articulated basis for doing so, and M&G based on its contention that this appeal was frivolous. Concluding that Ng's appeal, while meritless, did not rise to the level of frivolity, we deny both requests.

Dwyer, A.C.J.

WE CONCUR:

Baker, J.

Becker, J.